(2)

No. 94-1661

Supreme Court, U.S.
FILED
MAY 15 1995
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ASHLAND INC. - - - - - - - - Petitioner

versus

REVENUE CABINET,
COMMONWEALTH OF KENTUCKY - Respondent

On Petition for a Writ of Certiorari
to the Commonwealth of Kentucky, Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

DOUGLAS M. DOWELL
Revenue Cabinet
Office of General Counsel
Division of Legal Services
P.O. Box 423
Frankfort, Kentucky 40602
Ph: 502/564-3112
Fax: 502/564-4044
Counsel of Record for Respondent

May ~~22~~ 15, 1995

WESTERFIELD-BONTE CO., 619 W. KENTUCKY-P.O. BOX 3251, LOUISVILLE, KY.

JP

QUESTION PRESENTED

Whether Kentucky's imposition of use tax for the Petitioner's lease of corporate aircraft for use, storage and other consumption in Kentucky, based upon the application of the tax rate to the full purchase price or rental of the aircraft, violates the fair apportionment prong of the *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S 274 (1977) four-part test for the validity of a tax under the United States Constitution's Commerce Clause.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Contents	ii
Table of Authorities	iii–iv
Statement of the Case	1– 5
Reasons for Granting the Writ:	5
I. The application of Kentucky's Use Tax in This Case Does Not Violate the Commerce Clause	7–10
II. The Decision of the Kentucky Court of Appeals Does Not Conflict With Other State or Federal Court Decisions	10–11
Conclusion	11

TABLE OF AUTHORITIES

PAGE

Cases:

Archer Daniels Midland Co. v. *Department of Revenue*, 170 Ill.App.3d 1014, 120 Ill.Dec. 828, 524 N.E.2d 1010 (1988) 8–9

Associated Industries v. *Lohman*, 511 U.S. ____, 114 S.Ct. 1815, 128 L.Ed.2d 639 (1994) 3, 6

Colonial Pipeline Co. v. *Traigle*, 421 U.S. 100 (1975) 8

Commonwealth ex rel Ross v. *Lee's Ford Dock*, 551 S.W.2d 236 (Ky. 1977) 2

Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) ..... passim

D. H. Holmes Co. v. *McNamara*, 486 U.S. 24 (1988) 7

Delta Air Lines, Inc. v. *Revenue Cabinet*, 689 S.W.2d 14 (Ky. 1985) 6

Director of Revenue v. *Superior Aircraft Leasing Co.*, 734 S.W.2d 504 (Mo. 1987) 9

George v. *Scent*, 346 S.W.2d 784 (Ky. 1961) 2

Goldberg v. *Sweet*, 488 U.S. 252 (1989). 4, 7

Great American Airways v. *Nevada State Tax Commission*, 705 P.2d 654 (Nev. 1985) *cert. denied*, 479 U.S. 817 (1986) 8

H. K. Porter Co. v. *Commonwealth*, 111 Pa. Commonw. Ct. 463, 534 A.2d 169 (1987) 9

KSS Transportation Corp. v. *Director*, 9 N.J. Tax 273 (1987), *aff'd*, 11 N.J. Tax 89 (1989) 9

Kellogg Co. v. *Department of Treasury*, 204 Mich.App. 489, 516 N.W.2d 108 (1994) ... 9

Miller v. *Commissioner of Revenue*, 359 N.W.2d 620 (Minn. 1985), *cert. denied*, 471 U.S. 1116 (1985) 8

Miller Bros. Co. v. *Maryland*, 347 U.S. 340 (1954). 4

Minneapolis Star and Tribune Co. v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1982) 2–3, 7

National Geographic Society v. *California Board of Equalization*, 430 U.S. 551 (1977) 5, 6

Cases—Continued

Oklahoma Tax Commission v. *Jefferson Lines, Inc.*, 115 S.Ct. 1331 (1995) ..... passim

Quill Corp. v. *North Dakota*, 504 U.S. ____, 112 S.Ct. 1901, 119 L.Ed.2d 91 (1994) 4

Seaboard World Airlines, Inc. v. *New York State Tax Commission*, 118 A.D.2d 947, 499 N.Y.S.2d 513 (A.D.3 Dept. 1986) 9

Square D Co. v. *Johnson*, 233 Ill.App.3d 1070, 175 Ill.Dec. 221, 599 N.E.2d 1235 (1992) 9

Wardair Canada, Inc. v. *Florida Dept. of Revenue*, 477 U.S. 1 (1986) 6

Western Live Stock v. *Bureau of Revenue*, 303 U.S. 250 (1938) 8

Whitcomb v. *Commissioner of Taxes*, 144 Vt. 466, 479 A.2d 164 (1984) 9

Williams v. *Vermont*, 472 U.S. 14 (1985) 7

Statutes:

1985 Ky.Acts., Ch. 6 (Part III) §§ 6 and 7 2

K.S.A. §79-3606(k)(1989) 2

Ky.Rev.Stat.Ann. §§ 139.090; 139.120 (Michie (1991) 2

Ky.Rev.Stat.Ann. §§ 139.310; 139.190; 139.150; 139.130 (Michie 1991) 4

Miscellaneous:

II Jerome R. Hellerstein and Walter Hellerstein, State Taxation - Sales and Use, Personal Income, and Death and Gift Taxes, ¶ 16.01 (1992) 3

No. 94-1661

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ASHLAND, INC. - - - - - - - - - *Petitioner*

v.

REVENUE CABINET,
COMMONWEALTH OF KENTUCKY - - - *Respondent*

On Petition for a Writ of Certiorari to the Commonwealth of Kentucky, Court of Appeals

---

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Respondent accepts the statement of the case as set forth by Ashland Inc., except as clarified and modified below.

The Petitioner, Ashland Inc., formally Ashland Oil, Inc., leased seven aircraft from Ash Property, Inc., an Ohio corporation and subsidiary of Ashland. The lease agreements, which were entered into outside Kentucky, provided for initial lease terms of five or seven years and gave Ashland the option to renew each lease for additional periods of

time. The lease payments made by Ashland were fixed sums payable yearly or monthly.

Ashland took delivery of the aircraft in Kansas.[1] Tr. 7-8; Appellee's Tr. Exh. 1. Pursuant to the express terms of the lease agreements, the aircraft were thereafter "permanently based at [the] Ashland-Boyd County Airport" in Worthington, Kentucky. Tr. 13; Appellee's Tr. Exh. 1 (¶5 of each lease agreement making up this exhibit).

Kentucky use tax was assessed to Ashland in accordance with Ky.Rev.Stat.Ann. § 139.310 (Michie 1991) by applying the tax rate then in effect (5%) to the "sales price" of the property that had been "purchased for storage, use or other consumption in this state."[2] The purpose of this tax is to complement the sales tax—i.e., to act as a backstop or "dragnet to catch transactions that have escaped the sales tax, as in the instance of untaxed purchases in or from other states." *Commonwealth ex rel Ross* v. *Lee's Ford Dock*, 551 S.W.2d 236, 237 (Ky. 1977); *George* v. *Scent*, 346 S.W.2d 784, 788 (Ky. 1961). This is, of course, one of the primary purposes generally recognized as underlying use tax laws. *See, e.g., Minneapolis Star and Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575, 581-82

---

[1] Kansas law provides an exemption from its sales tax for ". . . aircraft sold and delivered in this state to a bona fide resident of another state, which . . . aircraft is not to be registered or based in this state and which . . . aircraft will not remain in this state more than 10 days." K.S.A. §79-3606(k)(1989).

[2] By legislation effective August 1, 1985, Kentucky amended its statutory definitions of "purchase" and "sale" to embrace bona fide leases or rentals. Ky.Rev.Stat.Ann. §§ 139.090; 139.120 (Michie 1991); 1985 Ky.Acts., Ch. 6 (Part III) §§ 6 and 7. The effect of this legislation was to expand the scope of both the sales and use tax to include bona fide leases or rentals as transactions resulting in the imposition of those taxes. *See also* KRS 139.200; 130.100(1)(a) 1 (Michie 1991); 103 Ky.Admin.Reg. 28:051.

(1982); *Associated Industries* v. *Lohman*, 511 U.S. ____, 114 S.Ct. 1815, 1821, 128 L.Ed.2d 639, 647 (1994); II Jerome R. Hellerstein and Walter Hellerstein, *State Taxation - Sales and Use, Personal Income, and Death and Gift Taxes*, ¶ 16.01 (1992).

In opposition to this use tax assessment, Ashland argued below that under the United States Constitution's Commerce Clause, use tax could be applied only to a portion of the aircraft rental payments based upon an apportionment or proration formula it had devised. In support of its position, Ashland offered evidence tending to show that between 14 and 24% of the airplanes' flight time was spent in Kentucky. Tr. 23, 25-27; Appellant's Tr. Exhs. 1 and 2. This proof also showed, however, that the great majority of the planes' time on the ground (between 67% and 82%) was spent in Kentucky. *Id; see also Ashland* Pet. 17a (the Kentucky Board of Tax Appeals concluding that "[t]he lion's share of [the planes'] ground time was spent [in Kentucky]"). There was no evidence offered of the *actual time* that planes were on the ground or in flight, in Kentucky or elsewhere. Instead, Ashland's evidence spoke strictly in terms of percentages. Appellant's Tr. Exhs. 1 and 2. As one of Ashland's witnesses explained:

> In other words, out of that 24 hours, the plane may have been in the air 3 hours. And that would only leave 21 hours of ground time. So if the airplane, say, was in Kentucky 10 and a half hours out of that 21, then 50 percent of the time would have been Kentucky ground time.

Tr. 33; *see also* Appellant's Tr. Exhs. 1 and 2.

The apportionment formula advocated by Ashland Oil assigned much greater weight or value to flight time than ground time. Tr. 16-21; Appellant's Tr. Exhs. 1 and 2. Specifically, this formula allotted a value of 90% of the lease payment for a given aircraft to flight time and a

value of 10% of the lease payment to ground time. *Id.* The payment terms of these leases, however, were fixed sums payable monthly or yearly and were *not* based upon whether or for how long the planes were flown. Appellee's Tr. Exh. 1; Tr. 13-19, 29-30. Furthermore, there is nothing in the relevant use tax statutes that authorizes the assigning of different weights to use and storage, as Ashland's formula sought to do. Ky.Rev.Stat.Ann. §§ 139.310; 139.190; 139.150; 139.130 (Michie 1991).

Under Ashland's formula, use tax would be applied to only a small portion of the lease payments. Appellant's Tr. Exh. 2. This portion bore little, if any, relationship to the *actual time* spent by these planes in Ashland's possession in Kentucky. Under the example given by the Ashland witness, *supra*, this formula would have permitted only 5% of the lease payment (50% Kentucky ground time x 10% value of ground time) to be taxed for Kentucky ground time—even though the plane in question was on the ground in Kentucky for over 40% (10_ hours) of the *actual time* it was in Ashland's possession during that period.

In the proceedings below, Ashland did not introduce any evidence establishing or even suggesting that any other state has in fact taxed or threatened to tax the leases involved in this case or the use, storage or other consumption of the aircraft that were the subject of these leases. Ashland also did not offer any evidence demonstrating that any other particular state would have had the requisite substantial nexus necessary to impose such a tax.[3]

---

[3] Occasional landings and takeoffs, overflight or other insubstantial presence or activity would not have sufficed to establish this nexus. *See Goldberg v. Sweet*, 488 U.S. 252, 263 (1989); *cf. Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954); *Quill Corp. v. North Dakota*, 504 U.S. ____, 112 S.Ct. 1901, 119 L.Ed.2d 91 (1994).

REASONS FOR DENYING THE WRIT

In holding that the use tax in question did not violate the fair apportionment prong of the four-part test enunciated in the *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), the Kentucky Court of Appeals decided the issue before it in a manner wholly consistent with, and supported by, this Court's decisions. Moreover, this Court has just rendered a decision discussing at length the relevant constitutional analysis and principles. *Oklahoma Tax Commission* v. *Jefferson Lines, Inc.*, 115 S.Ct. 1331 (1995). That decision fully supports the Kentucky court's holding, which was also consistent with the decisions of a number of other state courts that have considered the issue raised by Ashland in this case.

Therefore, special and important reasons for this Court's review do not exist in this case. Ashland's Petition for a Writ of Certiorari should be denied.

I. The Application of Kentucky's Use Tax in This Case Does Not Violate the Commerce Clause.

This case presents nothing more than the straightforward application of a state's use tax. In *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 555 (1977), a case decided after *Complete Auto Transit*, this Court observed:

> All States that impose sales taxes also impose a corollary use tax on tangible property bought out of State to protect sales tax revenues and put local retailers subject to the sales tax on a competitive parity with out-of-state retailers exempt from the sales tax. *The constitutionality of such state schemes is settled.* . . .

(Emphasis added.)

This Court's very recent decision in *Jefferson Lines supra*, reaffirms the validity of state sales and use tax systems and provides an extensive exposition of the consti-

tutional analysis relevant here. In that decision, this Court points out that in applying *Complete Auto Transit's* fair apportionment prong in the sales tax area, it has "had to set a different course" from the "allocation by percentages" that the "very term 'apportionment' tends to conjure up." 115 S.Ct. at 1339. Furthermore, the Court states that "[w]e have therefore consistently approved taxation of sales without any division of the tax base among different states, and have instead held such taxes properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded that sale or might occur in the future." *Id.*; *see also Wardair Canada, Inc.* v. *Florida Dept. of Revenue*, 477 U.S. 1 (1986); *Delta Air Lines, Inc.* v. *Revenue Cabinet*, 689 S.W.2d 14 (Ky. 1985). Thus, contrary to the theory advocated by Ashland in this case, fair apportionment under *Complete Auto Transit* does not translate into a requirement of formulary apportionment in the sales and use tax context.

This Court proceeds in *Jefferson Lines* to note its longstanding recognition of the validity of use taxes and the purpose of those taxes as "compensat[ing] the taxing state for its incapacity to reach the corresponding sale..." *Id.* at 1343. *See also National Geographic Society, supra; Minneapolis Star and Tribune Co.* v. *Minnesota Commissioner of Revenue, supra; Associated Industries* v. *Lohman, supra.* The Court further observes that a state's allowance of credits or exemptions for similar sales and use taxes paid to other states avoids the risk of multiple taxation that is the concern of the *Complete Auto Transit* test's fair apportionment prong. *Id.* at 1338, 1341-43.

Holding that this case presented no violation of the Commerce Clause, the Kentucky Court of Appeals reasoned that there was no risk of multiple taxation demonstrated to exist in this case and that to eliminate any possibility of

multiple taxation, a credit was available to Ashland under state law for any taxes that may have been paid to other states.[4] *Ashland* Pet. 7a. While the Kentucky Court did not have the benefit of *Jefferson Lines*, its holding is certainly consistent with and supported by that decision as well as other prior decisions of this Court. *See, e.g., D. H. Holmes Co.* v. *McNamara*, 486 U.S. 24, 31 (1988) ("[t]he Louisiana taxing scheme is fairly apportioned, for it provides a credit against its use tax for sales taxes that have been paid to other States"); *Goldberg* v. *Sweet* 488 U.S. at 263-64 (holding that telecommunications tax levied on gross charge of interstate telecommunications was fairly apportioned because "[i]ts economic effect [was] like a sales tax, the risk of multiple taxation [was] low, and actual multiple taxation [was] precluded by [a] credit provision").

Finally, to accede to the theory advocated by Ashland would defeat the use tax's very purpose of equalizing tax treatment between in-state and out-of-state transactions. *See, e.g., Miller* v. *Commissioner of Revenue*, 359 N.W.2d 620 (Minn. 1985), *cert. denied*, 471 U.S. 1116 (1985). Under Ashland's approach, persons renting or buying items within the state would pay tax on the entire purchase price or rental even though they might subsequently use the items outside the state, while those persons leasing or purchasing property outside the state for use inside the state would be able to pay a lower tax pursuant to a proration formula based strictly upon intrastate use. In this

---

[4] Ashland complains of the reciprocal nature of the credit. *Ashland* Pet. 11. However, it cites no authority suggesting that this is impermissible. It should be noted that Kentucky is apparently not unique in its requirement of reciprocity. *See, e.g., Williams v. Vermont*, 472 U.S. 14, 22 (1985) (noting that "[t]he District of Columbia and all but three States with sales and use taxes do provide such a credit, *although reciprocity may be required*" (emphasis added)).

latter situation, a portion of the purchase price or rental would, under Ashland's theory, escape taxation altogether to the extent the property's use (or storage) in another state was not of a magnitude (e.g., constituting overflight or some other occasional or insubstantial presence) sufficient to constitute the substantial nexus necessary to impose a tax. Such a result could hardly be squared with the firmly established principle of Commerce Clause jurisprudence that it is ""not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business."" *Complete Auto Transit*, 430 U.S. at 288, *quoting Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938) and *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100 (1975).

II. The Decision of the Kentucky Court of Appeals Does Not Conflict With Any Other State or Federal Court Decision.

Ashland insinuates that there is "a level of disarray among state courts" on the issue it raises. *Ashland* Pet. 15. However, it cites only one case, a 1958 state property or ad valorem tax case, in support of this contention. *Id.* at 14-15. Ashland also does not point to any decision of a United States court of appeals or district court as conflicting with the Kentucky Court of Appeals' disposition of the question presented.

Contrary to Ashland's assertion, the decision reached by the Kentucky court in the present case is consistent with a number of other state courts addressing in sales and use tax contexts the same or essentially the same Commerce Clause claim made by Ashland in this case. *See Great American Airways* v. *Nevada State Tax Commission*, 705 P.2d 654 (Nev. 1985), *cert. denied*, 479 U.S. 817 (1986); *Archer Daniels Midland Co.* v. *Department of Revenue*, 170 Ill.App.3d 1014, 120 Ill.Dec. 828, 524 N.E.2d

1010 (1988); *Square D Co.* v. *Johnson*, 233 Ill.App.3d 1070, 175 Ill.Dec. 221, 599 N.E.2d 1235 (1992); *Whitcomb* v. *Commissioner of Taxes*, 144 Vt. 466, 479 A.2d 164 (1984); *H. K. Porter Co.* v. *Commonwealth*, 111 Pa. Ct. 463, 534 A.2d 169 (1987); *Director of Revenue* v. *Superior Aircraft Leasing Co.*, 734 S.W.2d 504 (Mo. 1987); *KSS Transportation Corp.* v. *Director*, 9 N.J. Tax 273 (1987), *aff'd*, 11 N.J. Tax 89 (1989);[5] *Seaboard World Airlines, Inc.* v. *New York State Tax Commission*, 118 A.D.2d 947, 499 N.Y.S.2d 513 (A.D.3 Dept. 1986); *Kellogg Co.* v. *Department of Treasury*, 204 Mich.App. 489, 516 N.W.2d 108 (1994). Applying the *Complete Auto Transit* four-part test, these courts consistently sustained over Commerce Clause objections use tax assessments involving corporate aircraft such as those in this case.

Thus, there is hardly any "disarray" among the state courts on the issue presented.

CONCLUSION

The Kentucky Court of Appeals in this case correctly decided the constitutional issue before it, in a manner entirely consistent with the reasoning and holdings of this Court's prior decisions. The Kentucky court's decision is also consistent with the holdings of a number of other state courts that have been faced with the same or essentially the same issue. Moreover, this Court has very recently rendered a decision (*Oklahoma Tax Commission* v. *Jefferson Lines*) whose reasoning and analysis fully supports the Kentucky court's holding.

---

[5] *KSS Transportation Corp.* was quoted by this Court in *Jefferson Lines*, 115 S.Ct. at 1343.

Thus, there are simply no special and important reasons for this Court's review in this case. Accordingly, Ashland's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DOUGLASS M. DOWELL
Revenue Cabinet
Office of General Counsel
Division of Legal Services
P.O. Box 423
Frankfort, Kentucky 40602
Ph: 502/564-3112
Fax: 502/564-4044
Counsel of Record for Respondent